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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 89.

BRAINARD H. WARNER AND LOUIS D. WINE, TRUSTEES, ET AL.,

vs.

DAVID C. GRAYSON, TRUSTEES, ET AL.

No. 90.

FRANK I. WOOD, ET AL.,

vs.

DAVID C. GRAYSON, TRUSTEES, ET AL.

Brief on Behalf of Appellants in No. 89, Warner and Wine, Trustees, et al.

B. W. PARKER,
L. GOLDEN DONALDSON,
Solicitors for Warner and Wine, Trustees, et al.

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Statement of the Case.

This is an appeal from so much of the decree entered by the Court of Appeals of the District of Columbia as denies to the appellants in No. 89, Warner, Wine, and others, a lien for the security of their trust debt upon the easements in and over the strip of ground, 10 feet wide, on the south and west sides of the Victoria Flats building.

The material facts bearing on this question are that Mrs. Alice S. Hill, being the owner in fee simple of lots 1 and 2, block 45, of Hill's subdivision, University Park, located on the southwest corner of Fourteenth street and Welling Place, northwest, in the city of Washington, District of Columbia, each lot fronting 75 feet on Fourteenth street and running back 190 feet (a plat of said property is shown on page 12 of the record), did on January 13, 1897, convey the same in fee simple to the defendant, Nicholas T. Haller.

On the 22d day of January, 1897, said Haller made a building loan in the sum of $75,000 for the purpose of building an apartment house, to be known as the Victoria Flats, on that portion of said lots fronting 120 feet on Fourteenth street by the depth of 124 feet on Welling Place, and to secure said sum conveyed to the appellants, Warner and Wine, as trustees, the said property, "together with all and singular the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise, however, of the parties of the first part, of, in, to, or out of the said land and premises; to have and to hold the said land, premises, and appurtenances, unto and to the only use of the parties of the second part (Warner and Wine, trustees), the survivor of them, his heirs and assigns," etc. (see stipulation, Rec. pp. 174–5), and said Haller thereupon began the erection of said apartment house, and said $75,000, borrowed and secured as aforesaid, were advanced to him upon the faith and credit of the security afforded by the Victoria Flats building completed.

That on January 22, 1897, (and simultaneously with the execution of the deed of trust to Warner and Wine) the said Haller conveyed the remaining portions of said lots 1 and 2 to the appellees, McReynolds and Mer-

riweather, to secure his promissory notes in the sum of $12,315.

At the time of the making of the said deed of trust to Warner and Wine it was understood that Haller would so erect the building upon that portion of said lots 1 and 2, conveyed to said Warner and Wine, that a sufficient portion thereof would be left to furnish necessary light and air for said building, and approaches over the cement walks and through the areaways to the coal cellars, garbage chutes, and other necessary parts of the building, but on account of the claim of an adjoining landowner that there existed a restriction which required any building erected upon said lots to be placed back from the building lines on Fourteenth street and on Welling Place to a certain extent, Haller so constructed said building that its south and west walls extended back to the south and west lines of the property conveyed to Warner and Wine, in which south and west walls of the building so erected certain windows, doors, areaways, porches, and eaves were necessarily constructed which looked out upon, and extended over, the remaining portions of said lots 1 and 2 (conveyed by the Merriwether and McReynolds trust), by reason whereof, and the facts hereinafter stated, an easement in favor of the building and the ground on which it stands was created. That there is absolute necessity that said building should have the benefit of said easement, is abundantly shown by the proof.

Mr. Swartzell, who is connected with the real estate firm of B. H. Warner & Co., and who has been in the real estate business for about 24 years, testified that the effect upon the value of this property, for use and occupation, of closing the windows and doors on the south and west sides and moving the porches and areas on those sides would be disastrous; that a number of the apartments would be injured very seriously; that it

would affect two-thirds of the building at least; that the apartments on these sides would be rendered practically unavailable; and that it would seriously affect the salability of the property (Rec. pp. 48–9).

Mr. Robt I. Fleming testified that he had practiced his profession, that of an architect, for 40 years; that he had examined the Victoria Flats building; that the effect of constructing a building on the 10-foot strip right next to said Victoria Flats building on the south and west sides would really ruin the building, by blocking up the windows in these sides, making dark rooms; and in response to a question whether that effect would be obviated or improved in anyway by recesses, said:

> "There are recesses on the south, and windows could be cut into one room on each side of the recess, but they would still be dark rooms. Any building constructed south or west would block up the light" (Rec. p. 125).

Mr. James G. Hill, an experienced architect, testified that—

> "if a building were put up against the flats and had light wells where they could exist, it would afford partial relief; but still that would not eradicate the injury; that if there were no light wells at all it would practically ruin the rooms in the west and south sides" (Rec. pp. 129–30).

Frank I. Wood, one of the appellees, says in his answer, paragraph 5 (Rec. p. 19),

> "that upon due inquiry and inspection, it would have appeared to the complainants that the said property (i. e., Victoria Flats), owing to its improvident plan of construction, was dependent for certain of its light and air upon adjoining property,"

and this part of the answer is adopted by Wood's codefendant Talbott (said Wood and Talbott are appel-

lants in case No. 90, whose interests, if any, in said property will be hereafter shown). Despite this sworn statement, Wood, after testifying that he had acquired the 10-foot strip on the south and west sides of the building at the same time he purchased the Victoria Flats, evaded answering directly why this strip was desirable to him, and even testified that he did not know of any injurious effects that would result to the Victoria Flats if anybody built on the adjoining 10-foot strip. Finally he was asked:

> "Do you deny that if this land surrounding the Victoria Hotel property was built upon close up to the flats property, that the flats would be deprived of light and air?"

He answered, "No, sir" (Rec. p. 96). Talbott, although he refused to purchase the Victoria Flats until he was sure of controlling the 10-foot strip, testified that the building, deprived of light and air on those sides, would be less valuable, but that the question of the Victoria Flats being thus deprived of light and air did not enter into our (his and Wood's) calculations.

That Haller recognized the importance of this situation and endeavored to relieve it, is established beyond any doubt, as will be hereafter shown.

Upon the completion of the said Victoria Flats building the said Haller was indebted to various persons for material and labor furnished in connection with the building thereof in the sum of $30,087.65, and also for borrowed money in the sum of $10,350. To secure said last two mentioned sums, aggregating $40,437.65, Haller executed on December 20, 1897, a further deed of trust to Grayson and Heald, trustees, upon that portion of said lots 1 and 2 mentioned and described in the trust to Warner and Wine.

Simultaneously with this transaction Haller, being then financially much involved, executed to Holt and

Sebring, trustees, a fictitious deed of trust, purporting to secure the payment of his promissory notes, in the sum of $34,000, payable to William Oscar Roome and William J. McClure, on all of said lots 1 and 2, except those portions described in the trust to Warner and Wine. That this was a fictitious transaction appears from the testimony of McClure himself, one of the payees of the alleged notes, who testified that the first intimation he had of such a deed of trust was about September 6, 1899, nearly two years after its execution, and that he had never indorsed any of the notes (Rec. p. 40). About this time an arrangement was entered into by Haller and the parties interested in the trusts on the property whereby the rents were collected and the building managed by the real estate firm of Warner & Co., who were to use said rents to pay the interest on the first trust, taxes, insurance, and other charges, and apply the balance toward the second trust; and so long as this arrangement existed this was done, and no default occurred under the first trust.

On the 31st day of December, 1897, Haller executed a conveyance to the appellee, Bernard A. Duke (who acted therein solely for Haller, said Duke paying nothing for the conveyance), of those portions of lots 1 and 2, fronting 130 feet on Fourteenth street and running back 134 feet on Welling Place, thereby embracing all of the property described in the deed of trust to Warner and Wine, and in addition thereto a strip of ground 10 feet wide along the south and west walls of the Victoria Flats building. By this conveyance Haller himself by deed thus annexed the said 10-foot strip to the property on which the building stood.

Thereafter, on the 13th day of March, 1898, the defendant, Haller, conveyed to the appellee, Wood, the remaining portions of said lots 1 and 2. The only consideration paid by Wood for this conveyance was an equity

in two lots in the District of Columbia, of no value, and which were afterwards foreclosed for not more than enough to pay the trusts upon them. (Rec p 63)

Although all the remaining portions of said lots 1 and 2 were conveyed to Wood, as stated, he and Haller entered into a contemporaneous agreement, by which Haller, in consideration of the conveyance to him by Wood of the equity in said lots, agreed to further convey to Wood an undivided one-half interest in the Victoria Flats building and the ground upon which it stood, together with the 10-foot strip surrounding it (the title to which was then in Duke), in which agreement it was provided that Wood and Haller should form a stock company for the purpose of owning said apartment house and conducting the same, but said company was never organized, and Wood retained the title to said property. Thereafter, on the 1st day of April, 1899, Haller, in consideration of the payment to him by the appellee, Talbott, of $3,100, agreed in writing, under seal, to have conveyed to Talbott a one-half interest in the Victoria Flats building—

> "and the ground surrounding it, together with all and singular the rights and appurtenances thereto belonging, and also the furniture in said hotel."

The said agreement included this further language:

> "And I hereby authorize and direct Frank I. Wood and Bernard A. Duke, the parties in whose names the title now stands, to make and execute and deliver to said H. Maurice Talbott such deeds or conveyances as may be necessary the better to carry out the above contract" (Rec. p. 111).

This shows that, on the date of the making of said agreement, Duke and Wood held the legal title to all of said lots 1 and 2, and were acting therein at the direction of the said Haller, who could not hold title in

his own name because of his financial troubles. Up to the time of the filing of the original bill in this cause, the direction of said Haller to Duke and Wood to convey a one-half interest in certain of said property to Talbott had not been carried out.

Thereafter, on the 13th day of March, 1899, Duke, acting under the direction of Haller, executed a conveyance to Wood of the strip of ground 10 feet wide running along the south and west walls of said Victoria Flats building, being the same strip included in the deed from Haller to Duke, as hereinbefore mentioned, which was nothing more than an attempt to inequitably and fraudulently separate said easement from said building. On the same day the fictitious trust which Haller executed to Holt and Sebring, trustees, was by said trustees released to said Wood.

In paragraph 4 of the bill (Rec. p. 4), it is averred that—

> "In view of the said situation, an arrangement was entered into between the said defendant, Haller, and the holders of the promissory notes secured by the deed of trust to the defendants, McReynolds and Merriwether, by which, upon payment by said Haller or his assigns of four thousand dollars ($4,000) of the said encumbrance upon the said adjacent portion of the said lot, and extending along the entire western and southern exposures of the said Victoria Flats, should be released to the said Nicholas T. Haller, and be and become a part of said Victoria Flats property."

In paragraph 4 of the amended answer of Wood, which is adopted by and made part of the answer of Talbott, both of which are sworn to, the following specific denial is made (Rec. p. 18):

> "He (Wood) denies that any agreement was ever entered into between the defendant, Haller, and the holders of the promissory notes secured

by the deed of trust to McReynolds and Merriwether, that, upon payment of four thousand dollars ($4,000.00), the ten-foot strip adjoining the building on south and west should be released and become part of the Victoria Flats property."

The following letter (Rec. p. 112) signed by F. W. McReynolds (the trustee named in the McReynolds and Merriwether trust), and the receipt (Rec. p. 113) signed by said Wood, prove conclusively that there was an agreement to release the 10-foot strip, and that Wood was conversant with this fact:

[Letter.]

"OFFICE OF F. W. MCREYNOLDS, ATTORNEY AT LAW.

14th Feb., 1898.

N. T. HALLER, ESQ.

DEAR SIR: On behalf of C. M. Carter and Mrs. Alice S. Hill, holders of the notes secured. I desire to state that on the payment of the $4,000 due Jan. 22, '98, on pts. lots 1 & 2 B. 45 University Park by March 10, 1898, the trustees will be directed to release to you the 10 ft. adjoining the Victoria on the south & west.

Yours truly, F. W. MCREYNOLDS."

[Receipt.]

"WASHINGTON, D. C., *M'ch, 23, '98.*

Received of Nicholas T. Haller a deed of trust dated March 21, 1898, from Nicholas T. Haller et ux., to Frank T. Browning and Jesse H. Wilson, trustees, to secure the payment of a note made by said Haller for the sum of $6,000.00/100 which note and trust is to be placed in bank as collateral for the payment of a note made by Frank Ivey Wood for the sum of $4,000, which amount is to be used to pay two notes of said Haller, past due, and to obtain the release of certain land from the operation of a deed of trust, dated Jan. 24, 1897, to McReynolds and Meriwether, trustees.

FRANK IVEY WOOD."

In furtherance of this endeavor to obtain this release, the $4,000 were raised by borrowing that sum from the First National Bank of Gaithersburg upon the security of $4,000 of the McReynolds notes as collateral, which loan not having as yet been paid to the bank, the release has not been obtained. Also in paragraph 4 of Wood's answer the following language is used:

> "This respondent denies that the motive of the transactions between said Haller and the said McReynolds was to add the said 10-foot strip to the said flats property."

This denial the respondent persisted in (Rec. p. 99) until counsel for complainant produced an agreement (Rec. p. 100) in Wood's handwriting, in which, for a consideration therein named, Haller agreed to convey to Wood—

> "an undivided one-half interest in the parts of lots 1 and 2, . . . contained within the following metes and bounds, viz: Commencing at the southwest corner of Fourteenth street and Welling Place, and thence running southerly 130 feet; thence westerly 134 feet; thence northerly 130 feet to Welling Place, and thence westerly 134 feet to the place of beginning."

This description included the Victoria Flats property, with the 10-foot strip added.

Wood and Talbott claimed to be the owners of said real estate, and in the exercise of their authority as such, and with the concurrence of Heald (Rec. p. 44), terminated the authority and agency of said Warner & Co., hereinbefore set forth, and the collection of rents was assumed by Wood, with the concurrence of Talbott (Rec. pp. 19–20). Wood represented that he and Talbott could manage the property as well as Warner & Co., and would be saving the commissions paid to that firm (Rec. p. 44).

After the termination of the agency of said Warner & Co., as aforesaid, Wood then assumed the collection of rents, and did not keep up the interest on the first trust out of the rents collected, so that a default occurred under both the deed of trust to Warner and Wine, and the deed of trust to Grayson and Heald.

Wood claimed to be the owner of the 10-foot strip surrounding said building on the south and west sides, as well as the portions of said lots 1 and 2, except that portion on which the Victoria Flats building stood, and by reason thereof represented that the said building was not entitled to any easement over the strip surrounding it on the south and west sides for necessary light and air, and in other ways decried the security of the second trust, and undertook to purchase the notes secured by said second trust at a heavy discount.

It is alleged in paragraph 9 of the bill that Wood and Talbott endeavored to purchase the notes secured by the Grayson and Heald trust at a discount, and threatened that those who refused to accept their offer would get nothing, in one instance declaring that they would see that they got nothing. In the ninth paragraph of the answer of Wood, he—

> "denies that he ever attempted to purchase the promissory notes secured by the said second deed of trust . . . at any discount whatever, or that he ever made any threats that those who refused to accept such discount would get nothing, or that he ever declared that he would see that they got nothing."

This sworn statement is entirely disproved by the testimony of the following witnesses: Grayson, at page 38; McClure, p. 40; Zellers, p. 41; Mrs. McClure, p. 43, and Esher, p. 50; although he (Esher) did not identify the defendant, Wood, he (Esher) said the man who talked to him about buying his notes told him his name was

Wood. Indeed, Wood himself flatly contradicts his former statement on pages 53, 54, 55, and 56. The purpose of their thus desiring to obtain these notes was to afford them, Wood and Talbott, an opportunity of getting a new loan of $100,000 and paying off the indebtedness, amounting to, approximately, $119,000, due on the Victoria Flats property. Their failure to accomplish this purpose is attributed to Grayson, who consented to reduce the amount of his notes, but declined to give them any option to speculate upon (Rec. p. 38).

By reason of the default under the first deed of trust, hereinbefore set forth, Warner and Wine, as trustees, advertised said property to be sold thereunder, said sale to take place on the 6th day of September, 1899. When the attention of Grayson, the active trustee under the second trust, was called to the advertisement, he went to see Wood in his office to ascertain why the property was being sold. Wood told him that he did not have the money to pay the interest, that he (Wood) had not been to Warner with any offer to pay the money, or to ask for any indulgence if the money could be raised (Rec. p. 37). Later, Grayson went to see Wood at the latter's house, and offered to advance money enough to pay the interest on the first trust, but Wood refused to accept it, saying he would see Talbott, and then let him (Grayson) know (Rec. p. 37). Four or five days later they had another interview, at which the following occurred, as testified to by Grayson:

> "I gave them this letter of August 25, a demand I made upon them for the money to pay the interest on the first mortgage, and they (Wood and Talbott) intimated as much as that they were not willing to turn it over to me; they did not know that Warner would take the money. I offered to them, if they would go with me and pay their part, I would pay the balance. They did not agree to that. Then Mr. Talbott said that Mr.

> Wood was tired of managing the property in the interest of the second trust holders, and Mr. Wood spoke up and said they intended to make their money out of the ground, and I think Mr. Talbott reiterated that fact. Then I asked them the question, what they would want for the ground, or its value. I don't know the words exactly of the answer, but Mr. Talbott said he did not know, but it would be high enough" (Rec. p. 38).

No effort was made to communicate with Mr. Warner to see if he would accept Mr. Grayson's proposition.

After the property had been advertised, Wood asked Mr. Rheem, of the firm of B. H. Warner & Co., not to put a sign in front of the Victoria Flats property (Rec. p. 59), because he did not want to inconvenience anybody in the house (Rec. p. 108), although he did not care whether they left or not (Rec. p. 109).

Four days prior to the date of sale, to wit, September 2, 1899, the appellee, Wood, filed in the Supreme Court of the District of Columbia his bill of complaint against the appellee, Duke, alleging that the said Duke was the owner of that portion of said lots 1 and 2 upon which the Victoria Flats building was erected, and that he, said Wood, was the owner of all the remaining portions of said lots, and also alleging that the windows, doors, areaways, and other projections of the said Victoria Flats building extended over upon that portion of said lots alleged to be owned by the said Wood, and that the same were a nuisance, which he was entitled to have abated, and prayed for a mandatory injunction for the removal of said openings and projections.

This bill was filed by Wood for the purpose of keeping prospective bidders from bidding upon said property at the sale, so that the property would sell for a small sum, and that he and Talbott might buy it in and cut out the

parties secured under the second deed of trust, who had, by their materials and labor, as before stated, contributed to the construction of the building.

Although Mr. Wood, in his amended answer, stated "that no claim was ever made by any one to any such rights with respect to the 10-foot strip until the filing of the bill in this cause" (meaning the bill filed in this cause, in which this appeal is taken), Wood testified (Rec. p. 107) that when he filed his bill against Duke Mr. Grayson had asserted that he was going to claim a portion of the adjoining land.

On the 6th day of September, 1899, the day on which Warner and Wine had advertised their sale to take place, the bill of complaint in this cause was filed by David C. Grayson, one of the trustees in the deed of trust to secure Grayson and Heald, and the parties secured thereby; the said Heald declining to join because, as attorney, he represented interests adverse to the complainants, and for that reason he was made a defendant. Said sale by Warner and Wine did not occur, but receivers were appointed in this cause to take possession of the property pending this suit, and to collect the rents, issues, and profits thereof, which they did, and the receivers have ever since been in the control and possession of said property.

QUESTION AT ISSUE.

The question presented for the decision of this court is whether, in view of the situation and circumstances herein recited, the parties who made the said building loan of $75,000 to Haller for the erection of said building are not entitled to have their debt paid out of the proceeds of a sale of the said Victoria Flats building and the plot of ground on which it stands, being the ground described in the deed of trust to said Warner and

Wine, trustees, together with the easements appurtenant thereto.

At the time Haller gave the deed of trust to Warner and Wine, he was the owner of all of lots 1 and 2, and the $75,000 were loaned and advanced to him to erect the Victoria Flats building, and were used in the construction thereof. The parties loaning said money advanced the same upon the faith of the security which would be afforded by the completed building, with porches, areaways, and easements; and all of the notes aggregating said $75,000 are now outstanding, overdue, and unpaid, in the hands of a large number of persons.

It was never intended or contemplated by Haller, or by the persons advancing said building loan, that the building should be so constructed that its south and west walls would rest upon the south and rear lines of those portions of lots 1 and 2 described in the deed of trust to Warner and Wine, and still less that they should rest partly upon the ground covered by the McReynolds and Meriwether trust; but it was understood that said building would be so constructed that a sufficient portion of said building site would be utilized to supply the necessary porches, areaways, cement walks, entrances, and other conveniences for the reasonable use and enjoyment of said building, and it was only because of the said claim of a building restriction requiring said building should set back from the building lines of said lots that this plan was not carried out, and the building was constructed as it now stands.

The building contains "flats" or apartments for the housing and residences of families, and for the reasonable use and occupation of said building it is necessary to provide space for the porches, light, air, and ventilation to said apartments, and approaches to coal cellars and garbage chutes over the cement walks and through the areaways. There are

19 windows, 5 doors, and 4 cellar windows in the south side of said building, and 36 windows, 17 doors, and 4 cellar windows in the west side thereof. There is also a cement walk extending from the south and west walls of said building, which affords the only approach to the coal cellars, garbage chutes, and other necessary parts and conveniences of the building. There are porches on each floor of the south and west walls of said building extended over the 10-foot strip, and the eaves or roof of the building also extend beyond the south and west walls thereof. (See Rec. p. 51 and Stipulation Rec. pp. 162–3).

The apartments in which these openings are inserted are necessarily dependent upon the adjacent property for light, air, and ventilation.

ASSIGNMENT OF ERROR.

The court erred in denying to the holders of the notes secured by the Warner and Wine trust the benefit of the easement in the 10-foot strip.

ARGUMENT.

Equities.

We submit that the holders of the notes secured by the Warner and Wine trust are equitably entitled to the benefit of the easement over the 10-foot strip, for the reason that the $75,000 which they advanced was the means of erecting the building, and thereby creating the security.

As has been conclusively demonstrated by the proof in the case, it was intended by the appellee, Haller, at the time he obtained the loan to construct the building, that it would be sufficiently within the lines of the

property described in the deed of trust as to afford sufficient space for necessary light, air, ventilation, cement walks, approaches to the coal cellars, basement, garbage chutes, the porches, and the eaves or roof of the building, and the parties advanced their money upon the faith of that security.

It is not claimed, and, if denied, can not be claimed, that any notice was given of the change made by Haller in the plan of construction of said building, so that its south and west walls encroached upon the adjoining property and left it in the condition of impaired value and security, shown by the record.

The building erected is an apartment house, and contains, on the south and west portions of the building, many apartments for the residences of different families, so that it is absolutely indispensable that the south and west sides of said building shall have light, air, and ventilation, and that ingress and egress shall be afforded over the cement walks and areaways to the coal cellars, garbage chutes, and other necessarily used portions of the building.

This is the character of building which, it was understood both by the appellee, Haller, and the parties loaning the money under the Warner and Wine trust, should be erected, and the money so advanced was loaned for that purpose and no other.

At the time of the execution of the said deed of trust, and also at the time the building was fully completed, the appellee was the owner of all of said lots 1 and 2, comprising both the quasi-dominant and quasi-servient tenements.

The only other persons who had any interest in the matter, at that time, were the holders of the notes secured by the McReynolds and Meriwether trust, and none of them have opposed the claim of the holders of the notes under the Warner and Wine trust.

The only persons who are opposing the claim of the parties secured by the Warner and Wine trust are appellees, Talbott and Wood. What interest have they in the property? It will be remembered from the record that, after the execution by Haller of all the deeds of trust, Wood and Talbott acquired each a one-half undivided interest in the property. Whether they paid much or little, or anything, for their interest in the property does not affect the question at issue. At the time they became interested in it the building was fully completed, with the encroachment upon the adjoining property plainly apparent and fully known to them. Whatever interest they took in the property they admit was with full notice of the existence of said easements and of their necessity.

Aside from this, however, it was the intention of the appellee, Haller, from the beginning, to annex to the Victoria Flats building the 10-foot strip. It will be remembered that he attempted to do this in several ways: 1st. By making the agreement with the parties, secured under the McReynolds and Meriwether trust, to which Wood was a party (see Exhibit Receipt, Rec. p. 119), by which the 10-foot strip was to be released by the holders of that trust upon the payment to them of the $4,000; that he made an effort to pay said indebtedness by borrowing the money from the First National Bank, of Gaithersburg, and the only reason the said 10-foot strip was not released from the said trust is because two of the notes, secured by said trust, were used as collateral security to raise the money, and, said notes not having as yet been paid, the release was not executed.

2d. Haller, again, did actually annex the 10-foot strip by making the conveyance of the flats building site, together with the 10-foot strip, in one conveyance to the appellee, Duke. In this connection, it is to be re-

membered that Wood and Talbott acquired no interest in the property until after this conveyance, of which they had full and complete knowledge.

3d. By his contract of April 5, 1898, with Wood, by which the flats building, together with the 10-foot strip, as one property were to be conveyed and held together by a stock company.

In any event, Wood and Talbott, in that situation of affairs, and with the full knowledge which they admit was theirs, could not take a greater interest in the property than the defendant Haller himself had, and certainly, by reason of his conduct and the situation as it then stood, Haller could not have deprived the said flats building of the benefit of the easements.

That the easements over the 10-foot strip are absolutely indispensable to the flats building has been admitted by all. The appellee, Talbott, conclusively admitted, in his testimony (Rec. p. 82), that it would be foolish for a man to build a house of that kind on the ground, "and then he put a trust on the surrounding land," and before he would purchase an interest in the property from Haller he insisted upon the assurance of Haller that he had made arrangements to obtain, from Meriwether and McReynolds, a release of the 10-foot strip.

The appellee, Wood, showed his appreciation of the necessity of the 10-foot strip to the building, by seeking to have it come with his contract, detached from the building, for the very purpose of being thereby enabled to cut out the second trust note holders by a foreclosure sale under the first trust bought in by himself, and by his pretended suit against Duke to prohibit the use of the strip, and thereby exclude competition at the sale.

The deed of trust executed by Haller to Warner and Wine conveyed to them the land on which the building was erected, "together with all and singular the improvements, ways, easements, rights, privileges, and appurten-

ances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise however, of the parties of the first part, of, in, to, or out of the said land and premises, to have and to hold the said land, premises, and appurtenances, unto and to the only use of the parties of the second part, the survivor of them, his heirs and assigns," so that there was a clear understanding between the parties advancing the money and Haller himself, that they should have, as security for the money advanced, all of the land and the completed building, according to the agreement, with the full and complete enjoyment of all the necessary light, air, ventilation, approaches, etc., hereinbefore referred to.

The holders of the notes secured by the Warner and Wine trust, then, are entitled to the benefit of the easement over the 10-foot strip for four reasons, namely:

1st. Because any improvements made upon the real estate by Haller, after the execution by him of the trust to Warner and Wine, enured to the benefit of the parties secured by such trust.

2d. It is the undisputed fact that the money secured by the Warner and Wine trust was a building loan, and that they were to have security for the money advanced, not only upon the land mentioned in the deed of trust, but upon the building fully and completely finished as an apartment house. The porches, the necessary and intended facilities for light, air, and ventilation; the approaches to the basement and cellars, the garbage chutes, etc., were and are an actual, as well as a necessary, part of the completed building.

3d. Because it was their money, advanced under the said agreement, which erected the building, which building was intended and offered as a security therefor, and was obtained only on the faith of that security.

4th. Because the conduct of Haller, Duke, Talbott,

and Wood shows that they all knew and considered the 10-foot strip to be an absolute and indispensable part of the flats building, understood and intended to be annexed thereto, and they are now estopped from denying to the building the benefit of the necessary easements afforded by it, and which it was intended to afford.

Points and Authorities.

All improvements and betterments made upon real estate, by the mortgagor, or those claiming under him, after the execution of the mortgage, inure to the benefit of the mortgagee and become a part of the security for the debt.

10 A. & E. Enc. of Law (1st ed.), 260.
16 A. & E. Enc. of Law (2d ed.), 119, 120.
Owen *vs.* Fields, 102 Mass. 102.
1 Jones on Mortgages, sec. 681.
Scanlon *vs.* Geddes, 112 Mass. 17.
Snow *vs.* Orleans, 126 Mass, 456.
Martin *vs.* Beatty, 54 Ill. 100.
Rice *vs.* Dewey, 54 Barb. 455.
Union Water Co. *vs.* Murphy Fluming Co., 22 Cal. 621.
Booream *vs.* Wood, 27 N. J. Eq. 371.
Childs *vs.* Dolan, 5 Allen (Mass.), 319.
Holmes *vs.* Morse, 50 Me. 102.
Butler *vs.* Page, 7 Met. (Mass.), 40.
Graeme *vs.* Cullen et al., 23 Gratt. (Va.), 266.
Wharton *vs.* Moore, 84 N. C. 479.

An agreement to convey a house is construed to be an agreement to convey the land on which it is situated, and so much more owned by the constructor, as is necessary to the beneficial enjoyment of the house (Scanlon *vs.* Geddes, 112 Mass. 17; Snow *vs.* Orleans, 126 Mass. 456).

The mortgage of real estate includes not only the improvements then existing thereon, but all that may subsequently be added thereto (Union Water Co. *vs.* Murphy, F. F. Co., 22 Cal. 631–2). In that case it is said:

> "It was evidently the intention of the parties that the mortgage should cover and include the whole sluice and flume, as well that which was then completed as that portion then unfinished and which might thereafter be completed. The appellant, Traver, who is the subsequent mortgagee, contends that the mortgagor could only mortgage the part then completed, and that the decree of foreclosure is erroneous, as it includes the whole flume, which, since the date of the mortgage, has been completed, and that it should be limited to that portion only which was finished at the date of the mortgage. This objection to the decree is not valid. The mortgage includes, as we have shown, the uncompleted as well as the completed portions of the flume, and is equally valid as against the former as against the latter. The property mortgaged was in the nature of real estate, and the mortgage, without any special provision, would include all improvements or fixtures then on the line located for the flume, as well as those which might thereafter be put thereon."

Improvements put upon unimproved real estate, after the execution of a mortgage thereon, belong to the mortgagee, as a security for his debt.

Butler *vs.* Page, 7 Metcalf (Mass.), 40.

The court in that case said:

> "All buildings erected and fixtures placed on the mortgaged premises, by the mortgagor, must be regarded as permanently annexed to the freehold. They go to enhance the value of the estate, and will therefore inure to the benefit of the mortgagee so far as they increase his security for his debt; and to the same extent they enhance the value of the equity

of redemption, and thereby inure to the benefit of the mortgagor Winslow *vs.* Merchants' Ins. Co., 4 Metc. 306. There is no necessity to adopt any liberal rule in regard to fixtures, to enable a mortgagor to remove what he has erected at his own expense; because he has the full benefit of all such improvements when he regains the estate by redemption, which he may do, simply by payment of his actual debt. The general rule of the common law, therefore, that what is fixed to the freehold, becomes part of the realty, and passes with it, has its full effect, in regard to things erected on the land by an owner, who subsequently mortgages the land, and also in regard to things erected by the mortgagor after the mortgage."

In the case of Greame *vs.* Cullen et. al., 23 Grattan, 266, the Court of Appeals of Virginia uses this language:

"All buildings and other improvements and fixtures put upon mortgaged premises by the mortgagor, after the execution of the mortgage, become a part of the freehold, and inure as such to the benefit of the mortgagee. There are a great many authorities on this subject, but no conflict among them. All affirm or recognize the principle just stated. It is, perhaps, nowhere more clearly stated than by Chief Justice Shaw, in the case of Butler's Adms. *vs.* Page, 7 Metc. R. 40, referred to in the opinion of the chancellor in this case."

The second paragraph of the syllabus of that case recites that—

"the house on the lot in a city conveyed in trust is burned down, and the grantor in the deed employs workmen to build another house, upon an agreement to give them a lien upon the lot and house for the cost of the building. The workmen are not informed of the first lien until they have nearly completed the work, though it was duly

recorded. The whole property is subject to satisfy the first lien."

"Improvements made with the consent of the owner, upon land subject to a mortgage, by one who has notice of it, become subject to the mortgage in the same manner as if they had been made by the mortgagor himself."

1 Jones on Mortgages, sec. 681, and cases cited.

No authority need be cited to the effect that the deed of trust in question is in legal effect a mortgage.

Although there was no house upon the land mentioned in the deed of trust to Warner and Wine, at the time of the execution thereof, there is no doubt but these appellants have a lien upon such house. Indeed, when erected it became a part of the land. Why does it not follow that the easements are, also? The easements are a part of the dominant estate and inhere in it, and can not exist or be conveyed separate from it (Moore *vs.* Crose, 43 Ind. 30), and enure to the benefit of the mortgage security upon it. See 10 A. & E. Enc. (2d ed.) 402; Hankey *vs.* Clark, 110 Mass. 262.

In the case last cited the easement was created in favor of the dominant estate, after the execution of the mortgage, and the court held that it enured to the benefit of the mortgage security, and passed by a sale under the mortgage. The court said:

"Incorporeal rights of this description acquired by the mortgagor subsequent to the date of the mortgage, for the permanent improvement of the estate, and annexed by the terms of the conveyance to the realty, may be considered as passing to the mortgagee by the foreclosure, to be exercised by him at his election. There is no reason why incorporeal rights annexed to the realty should not enure to the benefit of the mortgage security in the same manner as improvements

in the nature of fixtures enure (Winslow *vs.* Merchants' Insurance Co., 4 Met. 306, 310). Until foreclosure the mortgage is deemed a lien or charge, subject to which the estate may be conveyed, improved, and in other respects dealt with as the estate of the mortgagor."

The language in the deed to Warner and Wine is—

"together with all and singular the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in any wise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise however, of the parties of the first part, of, in, to, or out of the said land and premises. To have and to hold the said land, premises, and appurtenances unto and to the only use of the parties of the second part, the survivor of them, his heirs and assigns."

That language does not mean simply the improvements, ways, easements, etc., which were a part of the estate at the time of the grant, but all that might be placed thereon or created therein at any future time during the life of the mortgage. How can it be maintained that the deed attaches to and includes a portion of the improvements and betterments placed on the estate after the execution of the mortgage, and not all?

Our contention, we think, has been upheld by this court and the Court of Appeals of the District of Columbia, settling the law in this jurisdiction.

In the case of Shepherd *vs.* Pepper, 133 U. S. 622, the facts did not present so strong an equity to the party claiming the benefit of the easement, as in the case at bar. In that case, Shepherd was the owner of a plot of ground upon which he erected a dwelling. In the erection of the dwelling he encroached upon an adjoining lot. He gave two deeds of trust, a first and a second, on

the dwelling. After that he acquired title to the adjoining land upon which his dwelling encroached, and thereafter he gave another deed of trust to one Mrs. Gray on said adjoining ground. When the matter came before the court of equity to determine the rights of all parties concerned, the court there sustained the contention that the parties secured by the deeds of trust executed prior to that of Mrs. Gray, and prior, even, to the mortgagor's acquisition of the adjoining land upon which his building encroached, should be entitled to the benefit of the easement over that land, although, according to the record, she held the first encumbrance upon that parcel.

In the case of Frizzell *vs.* Murphy, 19 App. D. C. 440, where the facts were similar to those in the case at bar, it was held that where the owner of two adjoining lots, having built a house on each, one of which is so built that its second story projects over the adjoining lot 3 or 4 feet, conveys the lot on which such house stands, with the improvements, easements, rights, and privileges thereto appertaining, neither he, nor any one claiming under him, can thereafter successfully assert a claim to have the projection removed, nor maintain an action against the owner thereof as for a nuisance.

In the case of Janes *vs.* Jenkins, 34 Md. 1, the syllabus recites—

> "that wherever an owner has created and annexed peculiar qualities and incidents to different parts of his estate (and it matters not whether it be done by himself, or his tenant by his authority), so that one portion of his land becomes visibly dependent upon another for the supply or escape of water, or the supply of light and air, or for means of access, or for beneficial use and occupation, and he grants the part to which such incidents are annexed, those incidents thus plainly attached to the part granted, and to which another part is made servient, will pass to the grantee as accessorial to the beneficial use and enjoyment of the land."

It cannot be seriously disputed, in view of the facts in this case, that an easement in the 10-foot strip adjoining the Victoria Flats is essential to the reasonable use and enjoyment of the building.

The doctrine that an implied grant of an easement will be sustained in cases of necessity has received recognition, by the great weight of authority, both in the United States and England. And while it is true that many courts have refused to apply the principle to cases before them, because the facts of those cases did not require its application, it is equally true that they have, almost without exception, asserted the *principle* to be as above.

In Evans *vs.* Dana, 7 Rhode Island, 306, where the question was whether an easement existed in a well, the court said:

> "An easement can not arise by implication from an express grant, unless there be some circumstances connected with the grant, or the estate granted, which show that the easement is *necessary* to the enjoyment of the estate granted, or to its proper enjoyment. Whether the right is necessary to the proper enjoyment of the estate, is a question often complex and difficult of solution; the principle, however, is settled, and the difficulty arises only in its application."

The following language appears in Washburn's Easements and Servitudes (4th ed.), 664:

> "So far, therefore, as weight of authority, both English and American, goes, it would seem that, if one sell a house, the light *necessary* for the reasonable enjoyment whereof is derived from and across adjoining land, then belonging to the same owner, the easement of light and air over such vacant land would pass as incident to the dwelling house, *because necessary to the enjoyment thereof.*"

In the case of Powell *vs.* Sims, 5 West Virginia, 1, at page 635, this single question of an implied grant of an easement was involved, and the court said:

> "The prevailing doctrine here would seem to be that an implied grant of an easement of light will be sustained only in cases of real and obvious necessity, and will be denied or rejected in cases when it appears that the owner of the dominant estate can, at a reasonable cost and expenditure, have or substitute other lights to his building, so that he may continue and have the reasonable enjoyment of the same." . . .
>
> "This rule, it appears to me, is dictated by wisdom and sound policy, and sustained by the plainest principles of justice and equity, and ought therefore to be applied and enforced in this country."

The ruling in this case was followed in Turner *vs.* Thompson, 58 Ga. 268.

In Rennyson's Appeal, 94 Pa. State, 147, the court, after reviewing other cases on this subject, said:

> "It is worthy of remark, however, that this case (i. e. Turner *vs.* Thompson, 58 Ga. 264; 24 Am. Rep. 497), limits the general application of Keats *vs.* Hugo as between dominant and servient tenements in one important respect. I think the limitation is wise and right. It is that an implied easement of light and air will be sustained in case of *real necessity*."

In the case of Sutphen *vs.* Therkelson, 38 N. J. Eq 318, which was a suit brought to restrain defendant from erecting a building on his lot which would exclude light and air from complainant's building, the court said:

> "The doctrine which is to govern this case rests not on user, but on an implication of grant or covenant, and on the principle that a man can not be permitted to derogate from his own grant. To the

> suggestion always made in cases of this kind, in opposition to the application of the doctrine in reference to city, town, or village property, that the enforcement of the privilege will greatly impair and perhaps practically destroy the value of the defendant's lot, it is enough to say that the law demands the application, and it is therefore the right of the complainant to have it made."

In Whiting *vs.* Olney et al., 3 Mason, 280, Mr. Justice Story, speaking of this principle, said:

> "The good sense of the doctrine on this subject is, that under the grant of a thing, whatever is parcel of it, or of the essence of it, or necessary to its beneficial use and enjoyment, or in common intendment included in it, passes to the grantee."

This principle of law is based upon the maxims that no man shall derogate from his own grant, and whoever grants the same shall be understood to grant, also, whatever is indispensable to the full beneficial enjoyment of it.

The appellants, we submit, are supported in their contention that the implied grant of an easement will be sustained, in cases of necessity, by the following authorities:

Rosewell *vs.* Pryor, 6 Mod. 116.
Palmer *vs.* Fletcher, 1 Lev. 122.
Buss *vs.* Dyer, 125 Mass. 287.
Collier *vs.* Pierce, 7 Gray, 18.
Story *vs.* Odin, 12 Mass. 157.
Ins. Co. *vs.* Patterson, 103 Ind. 582.
Lampman *vs.* Milks, 21 N. Y. 505.
Smyles *vs.* Hastings, 22 N. Y. 217.
Clawson *vs.* Primrose, 4 Del. Ch. 643.
Cave *vs.* Crafts, 53 Cal. 135.
Ray *vs.* Sweeney, 14 Bush. (Ky.) 1.
Bank of British North America *vs.* Miller et al, 6 Fed. 545.

And Mr. Chief Justice Alvey, in delivering the opinion of the court below in the case at bar, said:

> "It being a well settled rule of construction that the grant of a principal thing shall be held to carry with it all that is reasonably necessary for the enjoyment of the thing granted, for the purpose for which, according to the obvious intent of the parties, the grant was made, and that a grant is always to be taken strongly against the grantor, it would appear that the right to light and air would pass upon the conveyance of the building, under the circumstances, by the grant itself, where, as in this case, light and air is apparently necessary, even without any special words of conveyance. Pomfret *vs.* Ricroft, 1 Sand. 320, and notes; Blackisley *vs.* Whieldon, 1 Hare, 176, 180. But, without deeming it necessary to apply the principle as thus broadly stated, the deed of trust to Grayson and Heald, by express terms, not only recognizes the existence *de facto*, but the user, of easements of ways, *rights, and privileges, as appurtenant* to the said building. This is the clear import of the deed of trust. It is true, the deed, by its terms, does not limit the extent of the right of easement of light and air over the adjoining ground on the south and west sides of the building, but the acts and dealings with the subject by Haller, Wood, and Talbott, would clearly indicate that they found it necessary that a strip or space 10 feet wide on the south and west sides of the Victoria Flats building was reasonably necessary to supply the light and air to the rooms and apartments on those sides of the building. It is competent to arrive at the necessary extent of the space or area by what the parties have done in regard to it, and what they have recognized as reasonably necessary in actual use. Hall *vs.* Lund, 1 Hurl. & Colt, 676, 683."

The language employed in the Warner and Wine trust is identical with that in the Grayson and Heald trust.

In the case of Sheets *vs.* Selden's Lessee, 2 Wall. 177, where a similar question was raised, Mr. Justice Field said, at page 187:

> "The true rule on the subject is that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance. Thus the devise of a mill and its appurtenances was held by Mr. Justice Story to pass to the devisee, not merely the building, but all the land under the mill and necessary for its use, and commonly used with it. So a conveyance of a certain tenement, being one-half of a corn mill situated on a designated lot, 'with all the privileges and appurtenances,' was held by the Supreme Court of New Hampshire to pass not only the mill, but the land on which it was situated, together with such portion of the water privilege as was essential to its use."

See, also—

New Ipswith Factory *vs.* Batchelder, 3 N. H. 190
Rogers *vs.* Sinsheimer, 50 N. Y. 646.

In the case of Havens *vs.* Klien, 51 How. Pr. N. Y., p. 82, the facts of which were analagous to those in the case at bar, where a common owner of two tenements, the windows of one of which overlooked the yard of the other, receiving light and air therefrom, its shutters swinging out over such yard, and access from its fire-escapes which overhung the yard being had to such yard, severs the same by conveyances to different persons, it was held that an easement in favor of the tenement so overlooking the other was created in respect to light and air, the swinging of the shutters, and access to and from the fire-escapes, and further that it was immaterial whether such severance was by deed or mortgage, inasmuch as by foreclosure the mortgage ripened into a deed.

In Seibert *vs.* Levan, 8 Pa. St. 383, in an opinion by Mr. Chief Justice Gibson, it was held:

> "If one annexes peculiar qualities to his land, the alteration being palpable and manifest, a purchaser will take the land burthened or benefited, as the case may be, by the quality annexed to it."
>
> Reiner *vs.* Young, 38 Hun. 335.

In the case of Grace Church *vs.* Dobbins, 153 Pa. St. 294, where a bill was filed to compel the removal of a cornice from a building, the court, in reversing a decree in favor of complainant, said:

> "Where an owner of land subjects part of it to an open, visible, permanent, and continuous service or easement in favor of another part, and then aliens either, the purchaser takes subject to the burden or benefit, as the case may be. This is the general rule founded on the principle that a man shall not derogate from his own grant." Citing authorities.

In the case of United States *vs.* Appleton, 1 Sumner 492, Mr. Justice Story well remarks:

> "In the construction of grants, the court ought to take into consideration *the circumstances attendant upon the transaction*, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties."

It would be inequitable, under the facts of this case, to deny the parties secured by the deed of trust to Warner and Wine the benefit of the easements. It was understood at the time of the loan, that a building, with doors and windows for the admission of light and air on all sides and approaches over the cement walks and through the areaways to the cellars and garbage chutes, and space for the eaves, roof, and porches of the building, would

be constructed with the money advanced and secured by the trust to Warner and Wine.

The effect of the decree below is to deny to the parties, secured by the trust in question, a portion of the security which, it was understood, they were to have at the time of the loan.

It is respectfully submitted that the deed of trust to Warner and Wine is a lien on the entire property as it stands, including the easements, prior to that of Heald and Grayson, and that the decree should be corrected accordingly, and as corrected, affirmed. As we understand the brief of counsel for appellees, Grayson and others, they do not object to this, and, the easements being declared and established, we do not see how this suggested correction in the decree could prejudice the interests of any other parties to the suit.

Respectfully submitted,

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